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No. 80-295
IN THE

Supreme Court of the United States

October Term, 1980

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC.,

Petitioners,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*,

Respondents.

Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

I.

Counterstatement of the Questions Presented.

Respondents do not accept the formulation of issues presented by Petitioners and suggest the following counterstatement:

1. May the governing board of a local school district, acting without specific statutory authorization or the mandate of the State legislature, hold hearings and make administrative findings regarding the existence of prior discrimination against racial minorities and enact a minority business enterprise "set-aside" program to apply to state

and federally financed construction projects built within the school district?

2. May a local school board enact special bidding requirements governing the award of contracts for construction of public schools beyond those authorized and required by State law?

3. May a local school board, acting without authorization from the State, enact a minority business enterprise "set-aside" program for use on construction projects in its own district, when such program is in apparent conflict with the State law requirement that public works contracts be awarded to the lowest responsible bidder?

II.

Statement of the Case.

The San Francisco Unified School District ("School District") is a political subdivision of the State of California and is governed by a local Board of Education ("Board"). The powers and duties of the School District and the Board are set forth in California Education Code Section 35000 *et seq*. Specific statutory provisions authorize the Board to acquire sites for the construction of school facilities (Education Code §35270), acquire and pay for educational and athletic equipment (Education Code §35272) and maintain and operate schools and classes (Education Code §35290). Other statutory provisions explicitly authorize the School District and its Board to undertake other types of clearly described activities.

No provisions of the California Education Code explicitly permit a local school district or its board to enact minority business enterprise "set-aside" programs in the letting of school construction contracts.

California Education Code Section 39640 (''the lowest responsible bidder law'') governs the letting of school construction contracts:

> ''The governing board of any school district shall let any contracts involving an expenditure of more than eight thousand dollars ($8,000.00) for work to be done or more than twelve thousand dollars ($12,000.00) for materials or supplies to be furnished, sold or leased to the district, to the *lowest responsible bidder* who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.'' [Emphasis supplied.]

In March, 1977, the Board adopted an Affirmative Action Policy, which required that general contractors on school construction projects over one hundred thousand dollars ''employ non-white owned businesses for individual contract dollar amounts which total at least twenty-five percent of the general contract dollar bid.'' The Board determined that general contractors which submitted bids which did not meet the twenty-five percent minority business participation goal would not be considered ''responsible'' bidders within the meaning of the ''lowest responsible bidder'' statute.

In May, 1977, the U.S. District Court for the Northern District of California issued an order preliminarily enjoining the implementation of the Affirmative Action Policy, finding that the Board lacked the legal authority to promulgate such a policy. The Court found that the Affirmative Action Policy adopted by the Board conflicted with the lowest responsible bidder statute in the California Education Code. While noting that ''there is little doubt that the State of California itself could require compliance with an affirmative action policy of the kind here before the Court,'' and that ''the State could also authorize school boards to

declare and effectuate such policies," the Court found no statute in the California Education Code which permitted the Board to enact its own Affirmative Action Policy. The Court concluded that the Affirmative Action Policy "is a Board policy which lacks legislative authorization and therefore may not be legally imposed." (Petition, Appendix E.)

Subsequently, a motion for reconsideration was presented to the U.S. District Court. The moving parties contended that authority for enactment of the Board's Affirmative Action Policy lay in California Education Code Section 35160, which provides:

> "On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner *which is not in conflict with, or inconsistent with*, or preempted by, *any law* and which is not in conflict with the purposes for which school districts are established." [Emphasis supplied.]

The U.S. District Court rejected the argument that this statute furnished a basis for the adoption of the Affirmative Action Policy, finding that the policy conflicted with the lowest responsible bidder law (California Education Code §39640) and holding that the Board was without authority to require compliance with requirements in conflict with the provisions of that statute. (Petition, Appendix C.)

In reaching its decision, the U.S. District Court relied heavily on the decision of the California Supreme Court in *City of Inglewood v. Superior Court*, 7 Cal. 3d 861 (1972) in which the Court held that "a contract [for a public works project] must be awarded to the lowest bidder unless it is found that he is not responsible, *i.e.*, not *qualified* to do the particular work under consideration." 7 Cal. 3d at 867 [Emphasis supplied].

The District Court found that "there is not the slightest hint in *Inglewood* or any other California case that the term 'lowest responsible bidder' is sufficiently broad to justify the construction that a bidder is not responsible if he does not comply with a social policy adopted by the Board without constitutional or statutory authorization." (Petition, Appendix E, pp. 20-21.)

The U.S. District Court's decision was appealed to the Ninth Circuit Court of Appeals, which affirmed. *Associated General Contractors of California v. San Francisco Unified School District*, 616 F. 2d 1381 (9th Cir. 1980).

Although the Ninth Circuit Court of Appeals engaged in a lengthy and extensive discussion of the requirements of affirmative action programs, the critical determination it reached was that the U.S. District Court had correctly found the "lowest responsible bidder" statute to preclude the enactment of the Board's Affirmative Action Policy.

III.

Reasons the Writ Should Not Be Granted.

The Petitioners assert three reasons for granting a Writ of Certiorari in the instant proceeding. Respondents reply to each of those reasons in the order in which they are presented.

A. This Case Does Not Raise the Question of Whether a State May Constitutionally Prohibit All Race-Conscious Remedies; Rather, the Issue Is What Body Is Competent to Determine Whether a Race-Conscious Remedy Shall Be Enacted.

Petitioners argue that if the Education Code's lowest responsible bidder law prohibits the San Francisco School Board from adopting a race-conscious remedial program to redress prior discrimination, the law is unconstitutional.

With all deference to Petitioners, this contention ignores the fundamental issue at stake in this case. The question here is not *whether* it is appropriate to adopt a race-conscious remedy for alleged prior discrimination, but *who* would have the competence and authority to determine whether such a remedy is necessary or appropriate, and take the steps to adopt it.

As the Petitioners candidly note, the U.S. District Court's decision in this case focuses "not [on] whether the Board's purpose in enacting the program was a proper one, but instead whether the Board 'had the legal authority' to do so." (Petition, page 7.) This is the fundamental and dispositive issue in this case.

Under California law, a school district is simply a statutorily-created state-controlled entity, which exercises only those powers granted to it by statute:

> "Furthermore, a board of school trustees, being neither a natural nor an artificial person, does not enjoy the same natural privileges and constitutional rights as do such persons. Such a board is merely an administrative agency created by statute and invested only with the powers expressly conferred, subject to the limitations thereto attached by the legislature." *Grigsby v. King*, 202 Cal. 299, 304 (1927). See also *Hall v. City of Taft*, 47 Cal. 2d 177 (1956); *Ferdig v. State Personnel Board*, 71 Cal. 2d 96 (1969); *Burton v. Board of Education*, 71 Cal. App. 3d 52, 57 (1977).

The District Court found that "The crucial legal question here presented is not one of purpose. It is one of power . . . There is little doubt that the State of California itself could require compliance with an affirmative action policy of the kind here before the Court. The State could also authorize school boards to declare and effectuate such policies." (Petition, Appendix E, pp. 10-11.)

However, the District Court found an absence of any evidence that the California legislature had delegated such authority to the San Francisco School Board:

> "The powers of the Board derive entirely from the State Constitution and a state statute, the California Education Code. They are limited to those matters having a reasonably direct relationship to the operation of schools — matters such as administration, staffing, curricula, textbooks, school building construction and maintenance, rules for admission, disciplinary procedures, etc." (Appendix E, p. 15.)

The U.S. District Court concluded that the Board's Affirmative Action Policy was "a Board policy which lacks legislative authorization and therefore may not be legally imposed. Defendants must turn to the California legislature or the California electorate (through the initiative process) for authorization of that policy." (Appendix E, p. 21.)

Petitioner's reliance on *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), is misplaced. In *Swann*, the issue was whether a *state* could enact a statute which would actively hinder vindication of federal constitutional rights of school pupils. In this case, both the District Court and the Circuit Court of Appeals agreed that the manifest purpose of the lowest responsible bidder law is to protect the public fisc, a non-discriminatory purpose. *Swann* does not deal with the question of whether a local school board, which possesses only rights delegated to it by the state, may enact its own special minority business enterprise program which conflicts with state bidding procedures.

Respondents do not contend that the State of California is without the authority to enact a legal minority business enterprise program. The state, however, has passed no such legislation. The issue here focuses on the authority of a local school board to enact a program which flies in the face of

state legislation specifically directing school boards to award school construction contracts to the "lowest possible bidder." If the lowest responsible bidder law operates to perpetuate past discrimination, that is scarcely a matter which each individual school board in the state of California should address separately, in the absence of statutory authorization. If ameliorative provisions are necessary, the problem will have to be addressed by the State legislature itself.

The Petitioners attempt to finesse the issue of the Board's authority to enact an affirmative action policy by pointing to California Education Code Section 35160, a general enabling statute, which provides:

> "On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established."

The District Court found that this statute did not vest the School Board with authority to enact a minority business enterprise program which would apparently conflict with the Education Code's lowest responsible bidder law (§39640). The District Court found, and the Circuit Court of Appeals agreed, that the term "lowest responsible bidder" as used in California Education Code Section 39640 mandated that school construction projects be awarded to "the lowest bidder whose offer best responds, in quality, fitness, and capacity to the particular requirements of the proposed work". *Cf. West v. City of Oakland*, 30 Cal. App. 556 at 560 (1916). Because the Affirmative Action Policy of the San Francisco School Board would permit the award of school

construction contracts to contractors other than the "lowest responsible bidder," both Courts correctly held that the policy could not stand.

B. Petitioners' Argument That the School Board Has a Constitutional Duty to Engage in Affirmative Action to Remedy Past Discrimination Begs the Question of the Board's Authority to Investigate and Redress Discriminatory Conduct.

Petitioners' second argument is that once the Board has identified the existence of prior discrimination, it is under a constitutional duty to engage in affirmative action to remedy the effects of that discrimination. This argument simply begs the question. The fundamental issue never addressed by Petitioners is whether the School Board possesses the authority in the first place to hold hearings to "determine" that prior discrimination has occurred. The holding of such hearings and the prescription of remedies for whatever evils they may uncover is not one of the limited powers granted to local school boards by the State of California.

All of the decisions of this Court which have considered the obligation of non-judicial governmental entities to establish remedies for past discrimination have emphasized the requirement that the entity making the finding of past discrimination and prescribing the remedy be *competent* to do so. The facts of this case are parallel to those in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

In *Bakke*, Mr. Justice Powell explicitly noted that the Regents of the University of California were not an appropriate body to make findings and prescribe remedies regarding racial discrimination:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations . . .

> Petitioner does not purport to have made, *and is in no position to make*, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." 438 U.S. at 307-09. [Emphasis supplied; citations omitted.]

Mr. Justice Powell expanded on this point in his concurring opinion in *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980):

> "Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy *must have the authority to act in response to identified discrimination*. Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102, 96 S. Ct. 1895, 1905, 48 L. Ed. 2d 495 (1976). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In *Bakke*, the Regents failed both requirements. *They were entrusted only with educational functions*, and they made no findings of past discrimination." 100 S. Ct. at 2785. [Emphasis supplied.]

There is no party in the present action which is competent to hold hearings and reach determinations regarding the desirability of a minority business enterprise set-aside program for the construction of state financed public schools.

Petitioners appear to place some reliance on this Court's recent decision in *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980).

The Court's plurality opinion in *Fullilove* approving the congressional enactment of a "minority business enterprise" set-aside provision in the Public Works Employment Act of 1977 emphasized that the program was a valid exercise of "the broad remedial powers of Congress". The Chief Justice's opinion stated:

> "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 100 S. Ct. at 2777.

The San Francisco Board of Education does not possess broad remedial powers. It possesses only those powers conferred upon it by the State legislature. *Grigsby v. King*, 202 Cal. 299, 304 (1927). The adoption of social policies extrinsic to the School Board's mission of providing education facilities for the residents of San Francisco is simply not among the powers delegated to the Board by the State.

The linchpin of the *Fullilove* decision is the finding that Congress had adequate authority to address the issue of racial discrimination and prescribe reasonable remedies to redress the perceived discrimination. The Court's plurality opinion held that Section 5 of the Fourteenth Amendment granted Congress the power to regulate the procurement practices of state and local grantees of federal funds and that the objectives of the MBE program were within the power of Congress under Section 5 "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment. Nothing in *Fullilove* suggests, however, that the Court felt that lower level administrative agencies possessed such power.

Justice Powell's concurring opinion noted:

> "My view that this set-aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy *or that the selection of a set-aside by any other governmental body will be constitutional*". 100 S. Ct. at 2794 n. 14. [Emphasis supplied.]

Justice Powell concluded by noting:

> "[T]he issue here turns on the scope of *Congressional* power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War amendments. In this case, where Congress determined that minority contractors are victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose I find no constitutional reason to invalidate [the minority set-aside program]." 100 S. Ct. at 2794. [Emphasis supplied; footnote omitted.]

By contrast, the San Francisco School Board is not the repository of broad legislative and administrative powers. Instead, it is a local agency whose educational mission is strictly prescribed by the provisions of the California Education Code.

The question this case poses, then, is not whether there is an obligation to engage in affirmative action to remedy past discrimination, but *who* possesses such an obligation.

C. This Case Does Not Present an Appropriate Occasion for the Court to Consider What Entities Other Than Congress May Be Obligated to Adopt Race-Conscious Remedies for Past Discrimination.

Petitioners' last argument is that certiorari should be granted in this case to permit the Court to determine what entities other than Congress may be permitted or required

to identify instances of past discrimination and adopt remedies to redress them.

Respondents cannot concur that this is an appropriate case for such a consideration, since it seems quite clear that whatever entities other than Congress may have the right or obligation to adopt such remedies, the San Francisco School Board is not one of them.

Petitioners argue that certiorari should be granted in this case because the Circuit Court of Appeals' opinion apparently conflicts with the position taken by the Sixth Circuit in *Detroit Police Officers Association v. Young*, 608 F. 2d 671 (6th Cir. 1979).

This argument misconceives the posture of this case. The Sixth Circuit's extensive opinion in *Young* does not deal with the issue of the authority of the Detroit Police Department to set standards for the recruitment and promotion of police personnel. No argument was made that the Detroit Police Department did not possess such authority; rather, the argument advanced in that case was that the recruitment and promotion program violated state and federal statutes and provisions of the U.S. Constitution, and was predicated upon inadequate factual findings of prior discrimination. In its opinion reversing a number of factual findings of the U.S. District Court, the Sixth Circuit stated that "the Constitution imposes on states a duty to take affirmative steps to eliminate the continuing effects of past discrimination." 608 F. 2d at 691. However, the Sixth Circuit did not purport to state *what* steps would be appropriate in a given case.

In a footnote in its opinion in the present case, the Ninth Circuit notes its disagreement with *Young* "*to the extent* that the Sixth Circuit has relied on "reshuffle" cases to find a duty of states to take "stacked deck" affirmative action . . ." 616 F. 2d at 1386 n. 9. [Emphasis supplied.]

It can readily be seen that the asserted "conflict" between the two opinions is more apparent than real. Given the absence of authority vested in the District and the Board to adopt the Affirmative Action Policy for construction contract bids, the issue of whether an appropriate remedy would be of the "reshuffle" or the "stacked deck" variety is beside the point. Thus, the Ninth Circuit's disagreement with the quoted passage in *Young* is dicta.

Petitioners' assertion that the holding in the present action raises the same issues as are present in *Minnick v. Department of Corrections*, 95 Cal. App. 3d 506 (1979), *cert. granted*, 48 U.S.L.W. 3851 (July 2, 1980) (No. 79-1213), is simply wrong. In *Minnick*, two male Caucasians brought suit against the California Department of Corrections and its Director, alleging that they had violated various statutory and constitutional strictures by carrying out an affirmative action program in the hiring and promotion of Department of Corrections personnel.

Unlike the present action, the *Minnick* opinion raises no issue regarding the authority of the Department of Corrections and its director to promulgate legal regulations governing the hiring and promotion of Department of Corrections employees.

If this was a case in which the San Francisco School Board adopted an affirmative action program to govern hiring and promotion of *its own* employees, then it might be said to raise questions parallel to those present in *Minnick*. But this is not such a case.

All the Court is faced with here is an effort by a local school board to adopt its own unique bidding requirements for state financed school construction projects which are built within its boundaries.

D. Petitioners' Dissatisfaction With the "Reshuffle" and "Stacked Deck" Analysis Adopted by the Ninth Circuit Court of Appeals Does Not Furnish a Proper Basis for the Grant of Certiorari.

Although it is not stated by the Petitioners as a separate ground for their request for a Writ of Certiorari, it is apparent that the Petitioners take strong issue with the distinction drawn by the Ninth Circuit Court of Appeals between "reshuffle" and "stacked deck" remedies for past discrimination. However, the Petitioners' disagreement with the Circuit Court's analysis of various types of remedies for discrimination does not justify the grant of certiorari in this case.

Whether or not the Ninth Circuit Court of Appeals is correct in its analysis of "reshuffle" and "stacked deck" remedies for past discrimination, it is clear that the School Board is not the party charged with addressing the problem in its bidding procedures. Thus, the Petitioners' quibbles with the Circuit Court's analysis should not distract this Court from the pregnant fact that the School Board's Affirmative Action Policy went far beyond the authority vested in the Board under the provisions of the California Education Code.

E. Certiorari Should Not Be Granted Because the Resolution of This Case Turns on an Interpretation of Provisions of State Law.

As Respondents have already noted at length, the critical issue in this case is the nature and extent of the powers possessed by the San Francisco School Board, which is a "creature of statute" controlled by the provisions of the California Education Code. The District Court's conclusion that the School Board lacked the authority to enact the Affirmative Action Policy was based upon an extensive analysis of two provisions of the California Education Code, the "lowest responsible bidder" statute (California Edu-

cation Code §39640) and the general enabling provision (California Education Code §35160). The construction and interpretation of these statutes is entirely a matter of California law, which presents no questions of significance for this Court. The broad constitutional questions which Petitioners seek to advance arise only if one ignores the immediate issue of the Board's lack of authority to concern itself with matters which have not been delegated to it.

IV.

Conclusion.

The Petition for Writ of Certiorari should be denied.

Dated: November 18, 1980.

Respectfully submitted,

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